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SUPREME COURT, U.S.

No. 06-846

In the Supreme Court of the United States

In re M2 SOFTWARE, INC.

M2 SOFTWARE, INC.,
Petitioner,

v.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (Real Parties In Interest: Madacy Entertainment, Handleman Company, SFX Entertainment, M2 Communications, L.L.C., Gaylord Entertainment, Jeffory Moseley)
Respondents

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

MARK L. PETTINARI
Counsel of Record
LAW OFFICES OF MARK L. PETTINARI
Stock Exchange Tower
155 Sansome Street, Suite 400
San Francisco, CA 94104
Tel (415) 240-4200
Attorney for Petitioner
M2 SOFTWARE, INC.

QUESTION PRESENTED

1. Whether this Court should grant mandamus to direct the United States Court of Appeals for the Ninth Circuit to enforce the nondiscretionary, automatic and mandatory recusal statute of 28 U.S.C. § 455 to recall the mandates, vacate the judgments, and reassign the underlying appeals where the authoring Judge held a direct financial interest in the subject matter in controversy and in a real party in interest to the proceedings.

RULE 29.6 STATEMENT

The Rule 29.6 Statement of Petitioner M2 Software, Inc. is set forth in the Petition for Writ of Mandamus entered on the docket on December 19, 2006.

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In its Petition for Writ of Mandamus ("Pet."), M2 Software, Inc. ("M2") identifies a plain violation of the mandatory recusal statute by a Court of Appeals judge that resulted in a structural due process violation. The arguments now raised by Respondent M2 Communications, L.L.C. in its Brief In Opposition ("Opp.") ignore the dispositive fact that Time Warner, Inc. was identified in the *M2 Communications* Complaint under its then-current name, AOL Time Warner. As set forth in the Petition, Judge Pregerson i) knew that he owned Time Warner, Inc., ii) knew that the company was "formerly AOL Time Warner, Inc.," and iii) knew that the company was specifically identified in the Complaint as "AOL Time Warner." *Pet.* at 12. Recusal was automatic, mandatory, and nonwaivable under 28 U.S.C. §§ 455(b)(4) and (b)(5). The appearance of bias also required recusal under § 455(a).[1]

I. Judge Pregerson Was Indisputably Subject To the Mandatory Recusal Statute

Respondent's argument that 28 U.S.C. § 455(b)(4) does not apply is premised on its unsupported claim that "Judge Pregerson did not know that he owned stock in Time Warner." *Opp.* at 7. Judge Pregerson never asserted that he did not know that he owned stock in Time Warner, Inc. in this proceeding, and the evidence plainly demonstrates he did have such knowledge.

To support its claim of no knowledge, Respondent cites reporter hearsay from a *Washington Post* article concerning another case involving Time Warner, Inc., in which a reporter wrote that Judge Pregerson "said he did not realize he had a conflict, perhaps because he originally bought stock in AOL." *Washington Post*, April 18, 2006 [*Opp.*, at 10]. First, the rationale for not knowing of ownership of Time Warner based upon the Judge's original purchase of AOL cannot apply here, because Time

[1] Counsel for Defendant Gaylord informed counsel on January 23, 2007 that he was not filing an opposition brief but had not filed a formal waiver form because he was not a member of the Bar of this Court.

Warner, Inc. was specifically identified in the Complaint under its former name, "AOL Time Warner." *M2Comm* ER04-17/20. *See Pet.* at 9. Second, the position attributed to Judge Pregerson by the *Post* cannot be accurate, as the plain evidence shows that Judge Pregerson knew that he owned Time Warner, Inc. when he filled out his financial disclosure statements.[2]

The Ninth Circuit appeals for both cases commenced in 2003. Judge Pregerson knew he owned Time Warner, Inc. from the financial disclosure statement he filed on May 14, 2004, which covered the period January 1, 2003 through December 31, 2003. *MLPDecl.* Ex. 2 at 7-8. His knowledge was refreshed on June 4, 2004, when he acquired additional stock in Time Warner, Inc. *MLPDecl.* Ex. 2 at 12. Then, shortly after oral argument, on May 13, 2005 Judge Pregerson filed another financial disclosure statement for the period January 1, 2004 through December 31, 2004 that listed Time Warner, Inc. *MLPDecl.* Ex. 2 at 10-11. In fact, Judge Pregerson knew that he owned an equity interest in Time Warner, Inc. throughout the entire appeal. *See* Section III(A), below. The Judge's knowledge is indisputable and dispositive, because Time Warner, Inc. was identified by name in the Complaint (as "AOL Time Warner") as a real party in interest. ER04-17/20. Recusal under 28 U.S.C. § 455(b)(4) was automatic, mandatory, and nonwaivable.

Moreover, when Time Warner, Inc. acquired the accused division, Judge Pregerson as shareholder became a real party in interest to his own case, a situation that also required automatic, mandatory, and nonwaivable recusal. § 455(b)(5). *Pet.* at 21. At minimum,

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[2] Respondent [*Opp.* at 10] cites the Dec. of Mark L. Pettinari in Supp. of Mot. to Recall ("*MLPDecl.*"), Ex. 1 at 3 (chart of *Pet.* at 12, Table II). The *Post* chart was criticizing, not supporting, the "unknown AOL name" rationale upon which Respondent now relies. The accompanying contradictory graphic showed that Judge Pregerson had previously noted that Time Warner, Inc. was "formerly AOL Time Warner, Inc." in an earlier disclosure statement. *Pet.* at 12, Table II.

recusal was required under § 455(a) as a situation where the public, knowing all of the facts, would find an appearance of bias. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860-61 (1988). *Pet.* at 20.

II. *Liljeberg* Defines the Only Practicable Remedy

Respondent argues that, even if Judge Pregerson violated the mandatory recusal statute, the interest of finality and repose should trump the need to correct the structural due process violation. *Opp.* at 6. This Court has already confronted a substantially similar question in *Liljeberg*, which also called upon this Court to determine how to address a § 455 violation discovered after judgment. *Id.* at 861. While Respondent argues that similarity to *Liljeberg* is a reason *not* to issue a writ (the present case "will be of no precedential value" [*Opp.* at 5]), there is more reason to apply *Liljeberg* here.

Respondent essentially asks this Court to overturn *Liljeberg* and instead follow Judge Beezer's specially concurring opinions. *Opp.* at 6; Appendix to Petition ("*App.*") 2a, 5a. This Court should reject this invitation, as the new opinions – published opinions of the Ninth Circuit – have opened up a gaping loophole in 28 U.S.C. § 455. Absent a writ of mandamus here, the decisions create the opportunity for a conflicted federal judge to avoid the mandatory recusal statute in its entirety.

The problem lies in the timing of disclosure. In the Ninth Circuit, a party does not even learn the identity of the judges until one week before oral argument.[3] Thus, unless the judge discloses the conflict in proceedings, there is potentially no opportunity for a party to move to disqualify a conflicted judge under 28 U.S.C. § 455. While the rules require that a judge submit a financial disclosure statement, the procedure necessary for a party to obtain such a statement takes far longer than

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[3] *See* Ninth Circuit's Notice of Cases Set For Hearing, available at: http://www.ca9.uscourts.gov/ca9/Documents.nsf/54dbe3fb372dcb6c88256ce50065fcb8/e437fa645e4c14c788256778005d36a5/$FILE/ntc_hear.pdf

one week, and even if the statement is obtained it does not show current conflicts. *See The Chase Manhattan Bank v. Affiliated FM Insurance Co.*, 343 F.3d 120, 130-31 (2d Cir. 2003) ("[L]awyers for the most part expect judges to disqualify themselves under Section 455(b)(4). * * * [Even if lawyers were to review financial disclosure forms,] "those forms are generally a minimum of four months out-of-date"). By the rule sought by Respondent (*i.e.*, Judge Beezer's concurring opinion), a conflicted judge could simply take the case, elect not to disclose his financial interest, and rule so soon after oral argument as to prevent any opportunity of his financial interest being discovered before a judgment has been rendered. After the conflicted judge has rendered his opinion, he need not worry about 28 U.S.C. § 455 any longer, because under the Ninth Circuit's published opinions (and Respondent's argument [*Opp.* at 6]) the interests of finality and repose will control and the decision of the conflicted judge will be untouchable. This removes all appearance of justice.

As a practical matter, the Ninth Circuit's published opinions have broken the statute. This Court needs to step in to repair, so that the statute may carry the proper weight of its Congressional intent. Such repair requires only that this Court apply its prior decision of *Liljeberg* to issue a writ of mandamus against the substantially similar facts of the present case.

III. Correction of Respondent Misstatements

A. Judge Pregerson Had a Financial Conflict Throughout the Entire Time Period of Appeal

Respondent misleadingly suggests that the Judge's ownership of Time Warner, Inc. ceased on December 31, 2004. *Opp.* at 1. In fact, Judge Pregerson acknowledged ownership of Time Warner, Inc. for the entire period of the appeals, decided in late 2005. *App.* at 1a, 4a. Respondent relies upon the incorrect December 31, 2004 date to imply that Judge Pregerson was not assigned the cases until after that date – nearly 1 1/2 years after the appeals were filed. *Opp.* at 3. This impli-

cation is entirely unsupported. The Judge is silent on the issue, and the appearance is that he did participate in the early 2004 prejudicial orders that benefited the defendants. *Pet.* at 13 n. 10. The issue is moot because disqualification is required either way: Judge Pregerson acknowledged ownership of Time Warner, Inc. "at the time this case was assigned to this panel and at the time we decided it" and Time Warner, Inc.'s interests were at issue throughout. *App.* at 1a, 4a; *Pet.* at 9, 20, 23, 24.

B. § 455(a) Cases Concerning a Corporate Victim of Crime Apply a Different Standard

Respondent relies almost exclusively upon cases that reference conflicts far less direct than a judge's undisclosed financial interest under §§ 455(b)(4) and (5). Neither *In re Aguinda*, 241 F.3d 194 (2d Cir. 2001) nor *J. Hanshaw Ent., Inc. v. Emerald River*, 244 F.3d 1128 (9th Cir. 2001) [*Opp.* at 7] concerned a judge's financial interest. *U.S. v. Rogers*, 119 F.3d 1377 (9th Cir. 1997) and *U.S. v. Lauresen*, 348 F.3d 329 (2d Cir. 2003), *vacated by* 543 U.S. 1097 (2005) [*Opp.* at 8] concerned financial interest, but in the entirely different context of a corporate victim of crime in a criminal proceeding.

Though Respondent seeks to portray *Rogers* as a § 455(b)(4) case (characterizing it as concerning a judge who "held a limited financial interest in controversy," *Opp.* at 8), it is not. *Rogers* explicitly found that "stock ownership in the corporate victim of a crime *cannot* be deemed a financial interest in the subject matter in controversy." *Rogers*, 119 F.3d at 1384 (emphasis added).[4] *Lauersen* also concerned the corporate victim of crime, and explicitly noted that there was no claim being raised under § 455(b)(4) or (5). *Lauersen*, 348 F.3d at 334.

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[4] *Rogers* involved a full disclosure, waiver (28 U.S.C. § 455(e)), and a delay of 1 1/2 years. *Id.* at 1381-82. Here, there was *no* disclosure. Petitioner discovered the Judge's interest on June 22, 2006 through the online website of the *Post* (posting an earlier article published in the April 18, 2006 print edition), and filed its motion 15 days later. *MLPDecl.* at ¶2. This situation parallels *Liljeberg*, not *Rogers*.

Respondent avoids true § 455(b) cases because cases brought under § 455(b) by statute apply mandatory disqualification for a financial interest "however small." 28 U.S.C. § 455(d)(4). Congress intended to create "a bright-line test that is, as to actual partiality, more than a little overbroad." *The Chase Manhattan Bank*, 343 F.3d at 128. "[A] bright-line test as to equity interests in parties, particularly stock, avoids many difficult line-drawing decisions and is in that sense actually helpful to judges." *Id.* Respondent's cases do not apply this test.

C. M2 Has Yet to Receive Due Process Review By An Impartial Judge

Realizing that Judge Pregerson's disqualification was required against a bright-line test, Respondent resorts to arguing that due process was nonetheless satisfied because M2's case "was reviewed by the Ninth Circuit twice, and the Supreme Court twice, and was upheld each time." *Opp.* at 11. Respondent counts the election of the Ninth Circuit (upon Judge Pregerson's recommendation) not to vote for *en banc* review, and the election of this Court not to grant *certiorari*. Neither is an actual review. *See U.S. v. Carver*, 260 U.S. 482, 490 (1923) ("The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times"); *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950). This case has been reviewed only *once* – by a judge with a financial interest who contradicted a prior panel. *Cf. M2 Software, Inc. v. Viacom, Inc.*, 30 Fed.Appx. 710 (9th Cir. 2002). M2's Fifth Amendment constitutional right to due process requires that it be allowed a true appellate review by an impartial panel.[5]

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[5] Contrary to Respondent's claim [*Opp.* at ii], Judge Pregerson's conflict in two jurisdiction dismissals (Defendants Moseley and Gaylord) is also at issue. *See Pet.* at 15-16. Either Defendant could have safeguarded against disqualification had it identified Time Warner on its Rule 26.1 statement as new owner of the division accused in the lawsuit, after Time Warner, Inc.'s 2002 acquisition. *Pet.* at 9-10. *See The Chase Manhattan Bank*, 343 F.3d at 132-33 (appellees failed to revise court's disclosure statement to identify post-merger entity).

CONCLUSION

Respondent's Brief in Opposition is based on the false premise that Judge Pregerson did not know that he owned Time Warner, Inc. The evidence indisputably demonstrates otherwise. A Court of Appeals decision that preserved an acquisition by Time Warner, Inc. and found in favor of its interests was determined by a federal judge who knowingly owned equity in Time Warner, Inc. This was a plain violation of the statute. Recusal was automatic, mandatory, and nonwaivable by the bright-line tests of §§ 455(b)(4) and (b)(5). Further, the appearance of bias also required recusal under § 455(a). A writ of mandamus is necessary to direct the Ninth Circuit to enforce the nondiscretionary statute.

Respectfully submitted,

Mark L. Pettinari
Counsel of Record
LAW OFFICES OF MARK L. PETTINARI
Stock Exchange Tower
155 Sansome Street, Suite 400
San Francisco, CA 94104
Tel (415) 240-4200
Attorney for Petitioner
M2 SOFTWARE, INC.